Tentative Rulings for July 6, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

16CECG00691 ***James Allison, JR v. MUFG Union Bank, N.A.*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

(19) **Tentative Ruling**

Re: ***Lloyd v. Jebian***
Superior Court Case No. 12CECG00576

Hearing Date: July 6, 2016 (Department 403)

Motion: By defendant Bill Pfeif for summary judgment/adjudication of sixth amended complaint of Cliff Lloyd

Tentative Ruling:

To deny.

Explanation:

1. Absence of Issues in Notice Does Not Defeat Summary Judgment

The fact that the Notice of Motion does not list specific issues for summary adjudication, and that the separate statement also omits same, does call for the motion to be denied as to the request for summary adjudication. *Maryland Casualty Co. v. Reeder* (1990) 221 Cal. App. 3d 961, 974, fnt. 4; *Gonzales v. Superior Court* (1987) 189 Cal. App. 3d 1542, 1545; *Homestead Savings v. Superior Court* (1986) 179 Cal. App. 3d 494. However, moving party also sought summary judgment. That is not affected by any failure to specify an issue, as the movant seeks to have all issues, and therefore a judgment, found in his favor. Pfeif cannot obtain summary adjudication with this motion, but could obtain summary judgment.

2. No Fact Need Be Cited in Notice of Motion

Code of Civil Procedure section 437c(g) provides requirements for the Court's ruling. It does not require that a notice of motion set forth undisputed facts.

3. Summary Judgment

a. Introduction

The opposing papers were not served until the original hearing date, June 22, 2016. The Court told the parties that the continuance of the motions from June 22, 2016 to July 6, 2016 had no effect on the due dates for opposing and reply papers, and declines to consider the late opposition. However, moving party must still meet its burden of proof. *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal. App. 4th 1081 (*rev. denied*). See also *Kojababian v. Genuine Home Loans* (2009) 174 Cal. App. 4th 408, 416.

There are two causes of action against Mr. Pfeif in the Sixth Amended Complaint, the 2nd for breach of Business & Professions Code sections 17200 et seq. (the "UCL") and the 4th for fraud.

b. Law - UCL Claims

Where a broker has done his work in procuring a buyer, the fact that the listing agreement has expired will not relieve the seller of the duty to pay compensation. *Love v. Gulyas* (1948) 87 Cal. App. 2d 608. See also *Anthony v. Enzler* (1976) 61 Cal. App. 3d 872.

"If the broker is successful in procuring a purchaser, the requirement of performance within the period of the listing agreement is deemed waived. The statute of frauds does not prevent an *oral waiver* of a provision in a written contract limiting the time for performance." Miller & Starr, 2 California Real Estate 4th (4th Ed. 2010) section 5.50.

Section 5.51 of that treatise discusses how the listing agreement's promise to pay commission cannot be avoided by waiting until the listing expires to make the accepted offer. The discussion deals with owner and buyer talking to each other to avoid the commission. It states that most listing agreements therefore contain a "safety clause," wherein the owner agrees to compensate the broker if a sale is made within a certain time after the listing expires.

An issue commonly raised in such situations is whether or not the broker is the "primary procuring cause." See *E.A. Strout Western Realty Agency, Inc. v. Lewis* (5th Dist.1967) 255 Cal. App. 2d 254. In that case, the buyers had trouble arranging financing, but indicated they did indeed want the property. The listing expired. They had the property purchased by a relative who could do the financing, but moved in themselves and paid the note. "Whether plaintiff was the 'procuring cause' presents a question of fact and the evidence must be viewed in the light most favorable to plaintiff." (*Id*. at 258, citations omitted.)

Further, "It is immaterial that defendants themselves consummated the sale. A number of cases hold that where a broker procures a buyer he is entitled to his commission even though final negotiations are between the buyer and the seller." (*Id*.)

The *E.A. Stout* case was cited by the California Supreme Court in *Schachter v. Citigroup, Inc.* (2009) 47 Cal. 4th 610, 622 for the phrase: "He who shakes the tree is the one to gather the fruit." Miller & Starr (2d Ed.) California Real Estate, section 1:85 notes that: "The listing agreement typically contains the seller's irrevocable assignment of commission to escrow and this listing agreement typically has been signed prior to the property being put on the market. Therefore, this compensation agreement is between the brokers and

confirms, in most instances, the compensation rights already determined by the MLS rules." No full listing agreement is provided by moving party.

Defendant Pfeif cites *Dean Witter Reynolds, Inc. v. Superior Court* (1989). 211 Cal. App. 3d 758 for the proposition that the existence of a legal remedy forecloses relief under Business and Professions Code section 17200 et seq. (the "UCL"). The fact another remedy might be available does not foreclose UCL relief, as its remedies are cumulative.

See Business and Professions Code section 17205, which is not mentioned in *Dean Witter, supra*: "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state." "Remedies available under the UCL are cumulative to the remedies available under all other laws of this state. (Business and Professions Code section 17205.)

"Therefore, the fact that there are alternative remedies under a specific statute does not preclude a UCL remedy, unless the statute itself provides that the remedy is to be exclusive." *State v. Altus Finance S.A.* (2005) 36 Cal. 4th 1284, 1303. Pfeif has not cited any statute that forecloses additional remedies under the UCL in this instance.

As for restitution, moving party cites *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1140:

> "First, we address whether disgorgement of profits allegedly obtained by means of an unfair business practice is an authorized remedy under the UCL where these profits are neither money taken from a plaintiff nor funds in which the plaintiff has an ownership interest. We conclude that disgorgement of such profits is not an authorized remedy in an individual action under the UCL."

That is the crucial distinction here. In *Korea Supply*, the plaintiff represented an ***unsuccessful*** bidder. Here, Lloyd claims his own clients were the ***successful*** bidders, but another wrongfully took the commission payable to the buyers' agent. Lloyd contends he has a direct ownership interest in the half of the commission due to the buyer's agent. *Korea Supply* does not apply here.

Defendant characterizes this holding as finding that restitution is not permissible unless Pfeif took money or property from Plaintiff directly. That is not really the question however – it's whether or not plaintiff had an "ownership interest" in the commission. If plaintiff earned that commission, he did have such an interest. Wages earned and due are proper subjects of restitution, even though the worker may have never actually possessed them. See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal. 4th 163, which held that unlawfully withheld wages may be recovered as a restitutionary remedy in a UCL action.

Pfeif cites *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163. That matter addressed competitors, and found that where one competitor sued another for breach of the UCL's unfairness prong:

> "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."
>
> (*Id*. at 186-187.)

If the trier of fact believes Lloyd's version of the facts, surreptitious co-opting of real estate clients already in the middle of the offer process in order to reap a double commission at the expense of the agent that brought the clients to the table could be seen as injurious to competition, actionable under the UCL.

It could also be seen as unfair and unlawful, as a form of interference with contractual relations, for a buyer (or a buyer and a new agent), to act in a fashion so as to deprive the broker who was the "procuring cause" of the sale from his or her share of the commission. That does require that the listing contract provide for a commission to the "cooperating broker."

Pfeif has not placed the entire listing broker contract in evidence. Instead, Pfeif disputes that the listing agreement requirements were met, but many of the facts Pfeif says are material to this issue are disputed, as discussed below.

c. Pfeif's Separate Statement

Fact No. 4 states that the MLS listing expired on 2/19/2008 and that it offers a commission to a cooperating broker for submitting an offer acceptable to the seller "which ultimately results in the creation of a sales contract." The quote marks are in the Fact's language itself. There is no such language about a commission in the document referenced, which makes the entire fact disputed. **Fact No. 13** is the same.

Fact No. 8 is that on February 21, 2008, Jebian and Yarsharter obtained a pre-approval from Wells Fargo for $400,000, which was "insufficient to purchase the subject property at the offering price of $107,000." Exhibit 1 to Exhibit D shows the offering price as $689,900, so this fact is disputed.

The same exhibit says that a pre-approval letter is required, but no amount is listed. Further, the closing statement, Exhibit 3 to exhibit D of moving

party's evidence, showed that Jebian and Yarsharter put in well over $160,000 in cash: $7,871.38 in costs, $147,300 in deposit money, and another $10,000 deposit. The attempted inference, that Jebian and Yarsharter did not qualify to buy the house, is contradicted by the evidence. On summary judgment, inferences from the evidence must be drawn in favor of the opposing party. *Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal. App. 4th 1263, 1266.

Fact No. 10 is that when Lloyd submitted the first offer, Jebian and Yarsharter did not have pre-approval from Wells Fargo. The inference that Jebian and Yarsharter did not have pre-approval from Wells Fargo is disputed by the offer and the preapproval letter, which states: "credit approved on 2/20/2008." The first offer is Exhibit 1 to Lloyd's discovery responses, which are attached as Exhibit B to moving party's evidence. The letter from Wells Fargo is Exhibit 3 to same.

The letter appears to be faxed on 2/21/2008, but there is no information about who faxed it to whom.

Fact No. 12 is that the First Offer required that the seller complete repairs. This is disputed by the first offer from Lloyd's clients, Exhibit 1 to Lloyd's discovery responses, which are attached as Exhibit B to moving party's evidence. The Repairs part is paragraph 10. It says "repairs have to be completed prior to (illegible) verification of condition . . . Repairs to be performed at Seller's expense may be performed by the seller or through others . . ." There is no actual demand for repairs by the seller in the offer.

The above is sufficient to deny summary judgment.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 07/05/16.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Lloyd v. Jebian***
Superior Court Case No. 12CECG00576

Hearing Date: July 6, 2016 (Department 403)

Motion: by cross-defendant Service Assetlink Management Solutions, LLC for judgment on the pleadings on the second amended cross-complaint of Yarsharter and Jebian

Tentative Ruling:

To grant, without leave to amend.

Explanation:

The pleading alleges that moving party was the attorney in fact for Litton, which (in turn) was the attorney in fact for the seller. The misrepresentation at issue is alleged to be that the offer made by cross-complainants was conveyed to and rejected by the seller, and that the counter-offer ultimately accepted by cross-complainants did not come from the seller, but from moving party. Cross-complainants allege that because of this, they paid more money that they should have had to pay for the house.

The two causes of action asserted against moving party are fraud and negligent misrepresentation. "The necessary elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal. 4th 1226, 1239. Accord *Cicone v. URS Corp.* (5th Dist., 1986) 183 Cal. App. 3d 194. The California Supreme Court cites the difference a between fraud and negligent misrepresentation as s this: "The tort of negligent misrepresentation does not require scienter or intent to defraud." *Small v. Fritz Companies, Inc.* (2003) 30 Cal. 4th 167, 174.

Moving party asserts that the allegation it held power of attorney for the seller renders it able to approve or reject offers for the seller, as well as to make counter-offers. Opposing parties argue that the documents obtained in discovery show that moving party exceeded its authority by obtaining a higher price. The documents provided do not show any departure by the moving party from its authority, which must be read in conjunction with the agent's legal duties. An agent has a duty of loyalty to his principal. *Huong Que, Inc. v. Luu* (2007) 150 Cal. App. 4th 400, 410-411 (citations omitted):

> "The duty of loyalty arises not from a contract but from a relationship-here, the relationship of principal and agent. Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. Where such a relationship arises, the agent assumes a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."

Page 8 of the Exhibit to the contract provided by cross-complainants states that the moving party "is authorized to negotiate all offers to the fullest" within the price range approved by the seller. The documents offered do not show that an amendment can be offered which will support a claim for intentional or negligent misrepresentation.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 07/05/16.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Lloyd v. Jebian***
Superior Court Case No. 12CECG00576

Hearing Date: July 6, 2016 (Department 403)

Motion: by cross-defendant Pfeif for summary judgment/summary adjudication of second amended complaint of Yarsharter and Jebian

Tentative Ruling:

To deny.

Explanation:

1. Absence of Issues in Notice Does Not Defeat Summary Judgment

The fact that the Notice of Motion does not list specific issues for summary adjudication, and that the separate statement also omits same, does call for the motion to be denied as to the request for summary adjudication. *Maryland Casualty Co. v. Reeder* (1990) 221 Cal. App. 3d 961, 974, fnt. 4; *Gonzales v. Superior Court* (1987) 189 Cal. App. 3d 1542, 1545; *Homestead Savings v. Superior Court* (1986) 179 Cal. App. 3d 494. However, moving party also sought summary judgment. That is not affected by any failure to specify an issue, as the movant seeks to have all issues, and therefore a judgment, found in his favor. Pfeif cannot obtain summary adjudication with this motion.

2. Summary Judgment

a. Introduction

The opposing papers were not served until the original hearing date, June 22, 2016. The Court told the parties that the continuance of the motions from June 22, 2016 to July 6, 2016 had no effect on the due dates for opposing and reply papers, and declines to consider the late opposition. However, moving party must still meet its burden of proof. *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal. App. 4th 1081 (*rev. denied*). See also *Kojababian v. Genuine Home Loans* (2009) 174 Cal. App. 4th 408, 416.

b. Law on Fiduciary Duty in Real Estate Transactions

The cases cited by moving party on this issue apply only if moving party had no fiduciary duty to cross-complaints. Miller & Star, California Real Estate 3d Ed., at section 3:12, discusses the "Effect of Two Salespersons employed by the same broker" this way:

"When there is one broker, and there are different salespersons licensed under the same broker, each sales person is an employee of the broker and their actions are the actions of the employing broker. All listing contracts and all commissions are in the name of the broker, and all salespersons are employees of the broker regardless of their status for tax purposes. Salespersons work only for, and under the license of, their employing broker, and the acts of the salesperson are the acts of the employing broker."

"When one salespersons obtains the listing and represents the seller, and another salesperson employed by the same broker represents the buyer, they both act as employees of the same broker. That broker thereby becomes a dual agent representing both parties."

In support of that statement, Miller & Star cite Civil Code section 2079.13(b), which states:

" 'Associate licensee' means a person who is licensed as a real estate broker or salesperson under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee."

"The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions."

Miller & Starr note (at section 3:23) that:

"The unintended, undisclosed dual agency has been a serious problem in the real estate industry. The issue arises in two common situations: where there is only one broker who participates in the transaction, and where there are two brokers, a listing broker and a cooperating (selling) broker. However, it can also arise in situations where the agent represents persons competing to purchase or lease the same property, or where a single office with multiple agents is representing both parties to the transaction."

And see 54 Cal. Jur. 3d, "Real Estate," at section 301:

"A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the seller and

> the buyer in a transaction, but only with the knowledge and consent of both the seller and the buyer. As must be provided on the disclosure form provided to a prospective purchaser of residential real estate, in a dual agency situation, the agent has the affirmative obligation to both the seller and the buyer of a fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the seller or the buyer."

The facts and evidence adduced by moving party do not resolve the issue of fiduciary duty. Pfeif testified he had his own corporation. He also testified that he had no written agreement with Guarantee Real Estate ("GRE"). He testified he was uncertain what his arrangement was with GRE. Springer was a salesperson for Pfeif's office, and referred to Pfeif as her "broker." But she also testified that she was a GRE salesperson.

It is not possible on this record to determine, as a matter of law, whether GRE was the broker who employed both Pfeif and Springer, or whether Pfeif was the broker acting for the seller as well as the employer of Springer. It appears that under either scenario, Pfeif would also bear a fiduciary duty to Yarsharter and Jebian as well as to the sellers.

The facts listed in his separate statement in support of the motion do not demonstrate that he made full disclosure to them, acted with utmost good faith, or with complete honesty. The motion for summary judgment therefore fails.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 07/05/16.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Bank of Stockton v. Garcia***
Case No. 12 CE CG 03902

Hearing Date: July 6th, 2016 (Dept. 403)

Motion: Bank of Stockton's Renewed Motion for Sanctions against Morris Garcia, Sharon Garcia, and Their Counsel of Record

Tentative Ruling:

To deny the Bank's motion for sanctions against Morris Garcia, Sharon Garcia and their counsel of record. (Code Civ. Proc. § 128.7.) To deny the Garcias' request for sanctions against the Bank.

Explanation:

"Under Code of Civil Procedure section 128.7, a court may impose sanctions for filing a pleading if the court concludes the pleading was filed for an improper purpose or was indisputably without merit, either legally or factually… A claim is factually frivolous if it is "not well grounded in fact" and it is legally frivolous if it is "not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." In either case, to obtain sanctions, the moving party must show the party's conduct in asserting the claim was objectively unreasonable. (Ibid.) A claim is objectively unreasonable if "any reasonable attorney would agree that [it] is totally and completely without merit." (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440, internal citations omitted.)

"Code of Civil Procedure section 128.7 was adopted to apply rule 11 of the Federal Rules of Civil Procedure… Because of this intent and the fact that the wording of Code of Civil Procedure section 128.7, subdivisions (b)(2) and (c) is almost identical to that found in rule 11(b)(2) and (c), federal case law construing rule 11 is persuasive authority with regard to the meaning of Code of Civil Procedure section 128.7." (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167, internal citations omitted.)

"Under both Code of Civil Procedure section 128.7 and rule 11, there are basically three types of submitted papers that warrant sanctions: factually frivolous (not well grounded in fact); legally frivolous (not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law); and papers interposed for an improper purpose. (Code Civ. Proc., § 128.7; rule 11.)" (*Ibid*.)

However, "'[r]ule 11 must not be construed so as to conflict with the primary duty of an attorney to represent his or her client zealously. Forceful

representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way. Our law is constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution. Rule 11 must not be turned into a bar to legal progress.' We find that these principles are equally applicable to Code of Civil Procedure section 128.7." (*Id*. at pp.167-168, quoting *Operating Engineers Pension Trust v. A-C Co*. (1988) 859 F.2d 1336, 1344.)

Here, the Bank contends that the Garcias and their attorney had no reasonable basis for their claims, since the Bank clearly had the right to foreclose on the property of the LLC's and collect the proceeds of the sale based on its ownership of the Garcias' 50% economic interest in the LLC's. Thus, the Bank argues, there was no reasonable foundation for the Garcias' claim that the Bank improperly received money from the sale that should have gone to them.

However, although the court has found that the Garcias failed to state, and cannot state, any valid causes of action when it sustained the demurrer to the third amended complaint without leave to amend, this does not necessarily mean that the Garcias had no reasonable basis for bringing their claims.

In opposition to the motion, the Garcias have submitted a declaration from a certified public accountant, who states that the Garcias' third amended complaint has merit from an accounting perspective and had a substantial chance of success. (James Braun decl., ¶¶ 12-22.) According to Mr. Braun, the holder of a membership interest in an LLC is entitled to a share of any money received from the sale of capital assets of the LLC, such as real property, buildings, machinery and vehicles where the principal purpose of the LLC is not to sell such items. (*Id*. at ¶¶ 16-17.) On the other hand, the holder of an economic interest in the LLC is only entitled to a share of the income of the LLC, not an ownership interest in the capital assets of the LLC or a share of the money if the assets are sold. (*Id*. at ¶ 15, 16, 22.)

Also, Braun states that the holder of a membership interest in the LLC makes a capital contribution to the LLC in the form of money, property or services. (*Id*. at ¶ 18.) That capital contribution is credited to the member's capital account. (*Id*. at ¶ 19.) Upon transfer of an interest in the LLC, the transferee only acquires the rights and interests attributable to the type of interest being transferred, and nothing more. (*Id*. at ¶ 20.) Accordingly, upon transfer of an economic interest, the only thing the transferor acquires is the right to a stream of income from the LLC's ordinary course of business. (*Id*. at ¶ 21.) The transferor does not acquire an interest in the capital assets of the LLC if sold or liquidated upon dissolution. (*Ibid*.) The transferor also does not succeed to the transferee's capital account to the extent that the capital account holds funds attributable to the membership interest. (*Ibid*.) Also, the transferor is not entitled to "reach back" into the value of the capital accounts prior to the date of foreclosure. (*Id*. at ¶ 22.) Braun also claims that there is an ambiguity in the language of the Operating Agreements for the LLC's regarding the definition of "capital accounts", and that one interpretation of the agreements is that even if

a member's economic interests are foreclosed upon, they are still entitled to maintain a capital account which must be returned to them upon demand or dissolution. (*Id*. at ¶ 23.)

Thus, Braun's declaration tends to show that the Garcias' complaint is not frivolous, since they had a reasonable basis for their claims arising out of the opinion of an expert in accounting and LLC's. The gravamen of the Garcias' third amended complaint is that the Bank only obtained an economic interest in the LLC's and the Garcias retained their membership interest in the LLC's. Thus, the Garcias allege that they were entitled to repayment of their capital contributions to the LLC's when the LLC's assets were sold by the Bank. Braun's opinion seems to support the Garcias' claims, since he claims that a merely economic interest in the LLC's should not have entitled the Bank to obtain money in the Garcias' capital accounts, and that money should have gone to the holders of the membership interests, namely the Garcias. Thus, it appears that the Garcias had a reasonable basis for their claims, since they were entitled to rely on the opinion of a certified public accountant in bringing their claims.

While the court ultimately disagreed with the Garcias' theories and sustained the demurrer to the TAC without leave to amend, this does not mean that their claims were objectively frivolous from the outset. Consequently, the court intends to deny the Bank's motion for sanctions against the Garcias.

The Bank points out that the court has already granted sanctions against the Garcias in the related case of *Garcia v. Garcia*, case no. 15 CE CG 002784, and that the court should make a similar finding here. However, the *Garcia v. Garcia* case attempted to assert a financial elder abuse claim against the Garcias' niece and nephew, John and Janie Garcia, based on their failure to pay the Garcias' purported share of the sales proceeds and tax liabilities for the sale of the LLC's assets. There was no allegation in that case that John and Janie failed to pay Morris and Sharon for their money placed in capital accounts. The court found that plaintiffs had not shown that they suffered any money damages necessary to state an elder abuse claim given the fact that they had already lost their economic interest in the LLC's.

Also, an elder abuse claim requires a showing of theft or taking of the plaintiffs' property for a wrongful use or with the intent to defraud. (Welfare & Instit. Code § 15610.30.) In the *Garcia* case, the plaintiffs had not shown, and could not show, that John and Janie had engaged in a wrongful taking or had an intent to defraud, given the fact that they had been acting pursuant to a charging order and the court-sanctioned foreclosure process. Thus, the plaintiffs' complaint in that case was completely without merit and they were subject to sanctions for filing and prosecuting it.

Here, on the other hand, the plaintiffs have shown that they had at least some reasonable basis for filing their complaint, since their accounting expert opined that their claims were valid. As a result, the court will not grant the

motion for sanctions here even though it granted sanctions in the related elder abuse action.

Finally, the Garcias have also requested an award of sanctions against the Bank for bringing the motion for sanctions for the improper purpose of harassment and delay. (Code Civ. Proc. § 128.7, subd. (h).) However, it is does not appear that the Bank's motion was brought for an improper purpose, and it appears that it was brought in good faith on a reasonable belief that the Garcias' complaint was frivolous. Therefore, the court intends to deny the request for sanctions against the Bank.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 07/05/16.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Kaur v. Okunuga***
Superior Court Case No.: 14CECG02641

Hearing Date: July 6, 2016 (**Dept. 403**)

Motion: By Defendant Olalekan Okunuga for summary judgment or, in the alternative, summary adjudication

Tentative Ruling:

To grant summary judgment. The prevailing party is directed to submit directly to this Court, within 5 days of service of the minute order, a proposed judgment consistent with the summary judgment order.

All future hearing dates, including trial, are vacated.

Explanation:

Defendant Olalekan Okunuga ("Defendant") has met his burden to demonstrate that all the causes of action are barred by the one-year statute of limitations. (Code Civ. Proc., §§ 340.5, 437c, subd. (p)(2).) Plaintiff Sukhwinder Kaur ("Plaintiff") had her tooth extracted by Defendant on September 14, 2012. (Opposing separate statement of facts, exhibit 1, depos. Of Sukhwinder Kaur, pp. 22:15-25, 23:17-24:9.) This action was not filed until September 10, 2014. (Undisputed fact #17.)

First, although the complaint does not allege dental malpractice outright, it is clear that the gravamen of Plaintiff's complaint is for personal injury resulting from Defendant's dental treatment of Plaintiff. Plaintiff cannot avoid the statute of limitations by seeking to re-label her causes of action as for intentional tort or breach of contract. (*Larson v. UHS Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 351-353; *Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Assoc., Inc.* (2004) 115 Cal.App.4th 1145, 1153.)

Plaintiff's cases are distinguishable. This is not a situation where the defendant was a doctor and recommending tests where he could harvest the patient's cells to do research (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 129, 131-132), or where a doctor injected a patient with silicone which he knew was illegal because he had been arrested only a few months earlier for doing it to someone else (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 635-636), or a situation where doctors were stealing patients' eggs from patients' fertility treatments for their own financial gain (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 356). This is a dental malpractice action, stemming from an extraction of Plaintiff's tooth. A plaintiff's

cause of action is based on the primary right theory, and the primary right here is Plaintiff's right to be free from injury caused by a tooth extraction. (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 102-106.)

Second, Code of Civil Procedure section 351 has been declared unconstitutional in *Heritage Marketing and Ins. Services, Inc. v Chrustawka* (2008) 160 Cal.App.4th 754, 763-764, and later cases.

The plaintiffs there argued the defendants' move to Texas was not necessarily for the purpose of opening up the competing companies as opposed to simply wanting to live there, and thus the application of tolling pursuant to Code of Civil Procedure section 351 was not unconstitutional. (*Heritage Marketing and Ins. Services, Inc. v. Chrustawka, supra,* 160 Cal.App.4th 754, 760.)

The appellate court construed an out-of-state decision from Missouri which had held that applying a tolling statute against defendants who left Missouri after the cause of action accrued but before the statute of limitations expired unconstitutionally burdened interstate commerce. There was no indication that the holding was based on a finding that the move was for purposes of new employment. (*Heritage Marketing and Ins. Services, Inc. v. Chrustawka, supra,* 160 Cal.App.4th 754, 763, citing *State ex rel. Bloomquist v. Schneider* (Mo. 2008) 244 S.W.3d 139.)

Although the tolling statute in *Bloomquist* applied only to defendants who terminated residence in Missouri after the statute of limitations had accrued, the court determined the statute could not withstand a commerce clause challenge. The state's interest in aiding its residents' efforts to litigate against non-resident defendants did not justify denying non-residents the protections of the statute of limitations, particularly when long-arm service of process was available. The *Heritage Marketing* appellate court found *Bloomquist* persuasive and adopted its reasoning. (*Heritage Marketing and Ins. Services, Inc. v. Chrustawka, supra,* 160 Cal.App.4th 754, 763-764.)

> Section 351 penalizes people who move out of state by imposing a longer statute of limitations on them than on those who remain in the state. The commerce clause protects persons from such restraints on their movements across state lines. By creating disincentives to travel across state lines and imposing costs on those who wish to do so, the statute prevents or limits the exercise of the right to freedom of movement. Applying section 351 under the facts of this case would impose an impermissible burden on interstate commerce as it would force defendants to choose between remaining residents of California until the limitations periods expired or moving out of state and forfeiting the limitations defense, thus remaining subject to suit in California in perpetuity. [Internal citations and quotation marks omitted.] (*Heritage Marketing and Ins. Services, Inc. v. Chrustawka, supra,* 160 Cal.App.4th 754, 763-764.)

The *Dan Clark Family Ltd. Partnership v. Miramontes* (2011) 193 Cal.App.4th 219, case, relying in part on *Heritage Marketing,* held similarly. Because application of Code of Civil Procedure section 351 would force defendants like the defendants to choose between remaining in California until the limitations period expired, or returning to their place of residence, thereby forfeiting the limitations defense and remaining subject to suit in California in perpetuity, putting a nonresident defendant to such a choice discouraged interstate travel, and thus burdened any commerce that the individual might choose to engage in during those travels. (*Dan Clark Family Ltd. Partnership v. Miramontes, supra,* 193 Cal.App.4th 219, 232-233.)

As acknowledged by Plaintiff's opposition, application of the tolling provision of Code of Civil Procedure section 351 here would deny Defendant the benefit of the one-year statute of limitations, simply because he has moved out of state. Applying the statute this way would still create a disincentive to move out of state. This is particularly true where California has a long-arm statute for service of process. Plaintiff's interpretation of the tolling provision would treat residents and nonresidents differently, imposing an impermissible burden on interstate commerce. The *Heritage Marketing* case determined the tolling statute is unconstitutional, particularly here as to Defendant who has moved out of state permanently.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 07/05/16.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Marcum v. St. Agnes Medical Center et al.***, Superior Court Case No. 15CECG01327

Hearing Date: **July 6, 2016 (Dept. 403)**

Motion: Unopposed Demurrer and Motions to Strike re Second Amended Complaint by Defendants Herbert Thomas, Wayne Thomas and Sharon Wimberley

Tentative Ruling:

To strike the sixth and seventh causes of action. (Code Civ. Proc. § 436(b).)

To overrule the demurrer to the first cause of action. To sustain the demurrer to the second cause of action as to Sharon Wimberley and Wayne Thomas only, without leave to amend. (Code Civ. Proc. § 430.10(e).)

Sharon Wimberley, Herbert Lee Thomas and Wayne Thomas shall file their answer to the Second Amended Complaint within 10 days of service of the order by the clerk.

Explanation:

Motion to Strike

The court may, upon motion, strike all or part of any pleading not drawn or filed in conformity with the laws of this State and/or the court's prior orders. (Code Civ. Proc., § 436(b); *Lyons v. Wickharst* (1986) 42 Cal.3d 911, 915; *Ricard v. Grobstein, Goldman, Stevenson, Siegel, Levine & Mangel* (1992) 6 Cal.App. 4th 157, 162.)

The Second Amended Complaint ("SAC") was filed after the court sustained demurrers by defendants St. Agnes Medical Center and Leisure Care to the second cause of action, and granted the motion to strike punitive damages allegations. Without leave of court, the SAC added two new causes of action, the sixth and seventh. The amendment goes beyond the scope of the order granting leave to amend. When a demurrer is sustained with leave to amend, the leave is construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not add entirely new causes of action. (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015; *People ex rel. Dept. of Pub. Wks. v. Clausen* (1967) 248 Cal.App.2d 770, 785.)

Demurrer

The first cause of action for negligence resulting in wrongful death alleges that pursuant to Probate Code section 4714 Wimberley "owed Dorothy Thomas a legal duty to follow her physician's order for life sustaining treatment ("POLST") and Advanced Healthcare Directive ("AHCD") that mandated full resuscitation." The POST mandated CPR, full treatment, trial period of artificial nutrition including feeding tubes. It also alleges that she owed a duty to "refrain from making unauthorized oral changes to that directive or to take any action which could or would reasonably and proximately result in the expiration of Dorothy." (SAC ¶ 54.)

Wimberley argues that the SAC does not allege facts supporting the contention that she owed a duty pursuant to Probate Code section 4714.

Wimberley also relies on *People v. Heitzman* (1994) 9 Cal.4th 189, where the California Supreme Court held that an adult daughter, who was aware that her father was being grossly neglected but was not her father's caretaker, had no duty to *prevent* the neglect. The Court concluded that a legal duty of care can be imposed only upon a person with actual custody and control over the elder or upon a person with a legal duty to control the person with custody or control. (*Id*. at pp. 200-201.)

Here, though, plaintiff is not alleging a legal duty to take action to care for decedent. Even if the allegation relating to Probate Code section 4714 is off the mark, and that statute imposes no duty, plaintiff is alleging that Wimberley had a duty not to take action that would result in decedent's death. Plaintiff alleges that Wimberley, knowing "that Dorothy wanted her AHCD mandating full resuscitation to be followed," "approached Dr. Nareddy and informed him that Dorothy should not receive any lifesaving treatment whatsoever," even though she "had never had any authorization to act on Dorothy's behalf or even Lee's behalf." (SAC ¶ 12.)

"Under general negligence principles, of course, a person ordinarily is obligated to exercise due care in his or her own actions so as not to create an unreasonable risk of injury to others, and this legal duty generally is owed to the class of persons who it is reasonably foreseeable may be injured as the result of the actor's conduct." (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716.) Knowingly making unauthorized changes to another's healthcare directive, leading to that person's death, could be considered breach of the general duty to exercise due care.

Wimberley also argues that there is no causal link between her alleged actions and Dorothy's death. She says there is no allegation that Sharon told anyone to discontinue "therapies," to not intubate Dorothy, or to not take Dorothy to intensive care.

The court disagrees that the SAC does not allege a causal effect from Wimberley's actions. When plaintiff was admitted to the hospital she had her POST, which Dr. Vallapu confirmed receiving and reviewing. (SAC ¶ 10.) After being admitted, plaintiff was again presented with forms regarding her wishes regarding life-saving care and treatment, and she indicated that everything should be done to save her life. (SAC ¶ 11.) However, knowingly disregarding Dorothy's AHCD, Wimberley "approached Dr. Nareddy and informed him that Dorothy should not receive *any lifesaving treatment whatsoever*." (SAC ¶ 12, emphasis added.) Dr. Nareddy then altered the records/chart and physician's orders to indicate that Dorothy should not be resuscitated or receive any therapies in the event she needed medical intervention to stay alive. (SAC ¶ 13.) This is sufficient to allege a causal effect.

Wimberley also contends that exhibits to the SAC show that there would have been no opportunity to resuscitate plaintiff. She points out that Exhibit 6 to the SAC, the Nursing Progress Note, shows that at 6:44 p.m. on 4/30/13 Dorothy was found during rounds not breaching and with no heartbeat. The last documented check of Dorothy was recorded at 12:37 p.m., five hours earlier, meaning Dorothy could have passed away at any point in those five hours, and there was no opportunity for resuscitation even if the DNR status was not in place.

The court cannot at this stage make its own determinations, based on Dorothy's medical records, of the causation issue. Not enough information is known on this record, and it is a question for experts to address.

Accordingly, the demurrer to the first cause of action is overruled. However, the demurrer to the second cause of action for elder abuse should be sustained.

Neglect as defined in the Elder Abuse Act is committed by one who has the "care or custody" of the elder. (Welf. & Inst.Code § 15610.57(a)(1); *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404.) This is something the SAC recognizes at paragraph 59, which notes the Act's definition of neglect, quoting *Carter*.

Though the SAC alleges that Herbert Lee Thomas was Dorothy's primary caregiver and had authority to make medical decisions on her behalf (SAC ¶ 18), there are no allegations that Dorothy was in the care or custody of either Wimberley or Wayne Thomas. Instead, the SAC alleges that Wimberley, with no "authorization to act on Dorothy's behalf or even Lee's behalf … appears to have simply materialized as the angel of death at Dorothy's side." (SAC ¶ 12.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 07/05/16.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(20) **Tentative Ruling**

Re: ***Babcock et al. v. Centex Homes et al.***
Case No. 12CECG04013
Centex Homes et al. v. Windows By Advanced, Inc., et al.
Case No. 13CECG02959

Hearing Date: **July 6, 2016 (Dept. 501)**

Motion: Fresno Precision Plastics' Motion to Determine Good Faith Settlement

Tentative Ruling:

To grant. (Code Civ. Proc. § 877, *et seq*.)

Explanation:

Under Code Civ. Proc. § 877.6, "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005." (Code Civ. Proc. § 877.6(a)(1).)

"The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." (Code Civ. Proc. § 877.6(b).)

"A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (Code Civ. Proc. § 877.6(c).)

Where the motion for good faith settlement is not contested, a barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case, is sufficient to meet the settling party's burden of showing good faith. (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261.)

Inasmuch as the motion is uncontested, the court finds that the motion is sufficient to show a prima facie showing of good faith.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 7/5/16 .
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Acclaim Credit Technologies v. Big Valley Farm and Management, Inc.***
Superior Court Case No. 15CECG03404

Hearing Date: July 6, 2016 (Dept. 501)

Motion: Plaintiff's motion for leave to file Second Amended Complaint

Tentative Ruling:

To deny without prejudice. (Cal. Rules of Court, rule 3.1324(b).)

Explanation:

The requirements of California Rules of Court, rule 3.1324, subdivision (b) have not been met. The supporting declaration submitted by Plaintiff is simply a recitation of the procedural history of the case. Accordingly, Defendant's motion is denied without prejudice.

The Court notes once more that Plaintiff seeks leave to file a Second Amended Complaint, though no First Amended Complaint is on file with this Court. The document that Plaintiff contends is a First Amended Complaint (see Decl. of Hernandez, ¶4; Exh. B), is in fact an order granting Plaintiff's motion to reclassify the action to an unlimited case.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 7/5/16 .
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Robert Gonzalez v. Ashley M. Avila***
Superior Court Case No. 14CECG01946

Hearing Date: Wednesday, July 6, 2016 (**Dept. 501**)

Motion: Cross-Defendant Paul Holguin Flores' Motion to Strike Cross-Complainants Ashley Michelle Avila's, Donald Blanchard's, and Holly Starr Blanchard's Cross-Complaint

Tentative Ruling:

To grant Cross-Defendant Paul Holguin Flores' motion to strike Cross-Complainants Ashley Michelle Avila's, Donald Blanchard's, and Holly Starr Blanchard's cross-complaint. (Code Civ. Proc., §§ 428.50, subds. (b) & (c), & 436, subd. (b).)

Explanation:

Cross-Defendant Paul Holguin Flores ("Cross-Defendant") moves to strike Cross-Complainants Ashley Michelle Avila's, Donald Blanchard's, and Holly Starr Blanchard's ("Cross-Complainants") cross-complaint pursuant to Code of Civil Procedure section 436, subdivision (b). Cross-Defendant argues that the cross-complaint should be struck in its entirety because, even though the cross-complaint was filed after the initial trial date was set, Cross-Complainants failed to obtain leave of court to file the pleading.

Since Cross-Complainants' cross-complaint is against third-party cross-defendants, Cross-Complainants had until the Court first set the case for trial to file the cross-complaint without leave of court. (Code Civ. Proc., § 428.50, subds. (b) & (c); see *Loney v. Superior Court* (1984) 160 Cal.App.3d 719, 722-723.) Given that Cross-Complainants filed their cross-complaint on April 20, 2016, almost a year and a half after the case was first set for trial at the November 10, 2014 case management conference, Cross-Complainants were required to obtain leave of court before filing their cross-complaint. However, Cross-Complainants failed to do so. While Cross-Complainants argue that the Court should deny Cross-Defendant's motion because the Court signed a stipulation and order on June 6, 2016 to continue trial so that the new parties added to this action through the filing of the cross-complaint would have time to litigate the action before trial begins, the stipulation and order was submitted and signed after the cross-complaint was filed and did not retroactively authorize the filing of Cross-Complainants' cross-complaint.

Since the cross-complaint was filed without the required leave of court, the Court grants Cross-Defendant's motion to strike Cross-Complainants' cross-

complaint as "not … filed in conformity with the laws of this state[.]" (Code Civ. Proc., §§ 428.50, subds. (b) & (c) & 436, subd. (b).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 7/5/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***Gonzalez et al. v. Vemma Nutrition Company et al.***
Case No. 14CECG00134
Alonzo et al. v. Vemma Nutrition Company et al.
Case No. 14CECG01023
Martinez v. Vemma Nutrition Co. et al.
Case No. 14CECG01715
Smith v. Union Pacific Railroad et al.
Case No. 14CECG02314

Hearing Date: **July 6, 2016 (Dept. 502)**

Motion: Union Pacific Railroad's Motion to Bifurcate

Tentative Ruling:

To deny. (Code Civ. Proc. §§ 598, 1048(b).)

Explanation:

Under Code Civ. Proc. § 598, court is given great discretion in regard to the order of issues at trial:

> The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order…that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case….

Similarly, Code Civ. Proc. § 1048(b) specifies the court's discretion in regard to bifurcating issues for separate trial:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action … or of any separate issue or of any number of causes of action or issues.

These sections are generally relied upon for bifurcation, usually to try issues of liability before damages issues. "It serves the salutory purpose of avoiding wasting time and money, and prevents possible prejudice to a defendant where a jury might look past liability to compensate a plaintiff through sympathy for his

or her damages" (Rylaarsdam & Edmon (The Rutter Group 2013) *California Practice Guide: Civil Procedure Before Trial*, "Case Management & Trial Setting" § 12:414.) The decision to grant or deny a motion to bifurcate issues, and/or to have separate trials, lies within the court's sound discretion. (See, *Grappo v. Coventry Financial Corp*. (1991) 235 Cal.App.3d 496, 503-504.)

Here, it does not appear that bifurcating liability from damages would be conducive to expedition and economy, or offer any time savings. Union Pacific's strongest argument for bifurcation is to avoid prejudice that might result from the jury allowing its sympathy and passion to influence its determination of liability. However, even in personal injury and wrongful death cases, bifurcation is the exception, rather than the rule. Union Pacific has not shown that this action presents unusual circumstances indicating that there is a significant chance that the jury would not be able to adjudicate the issues as instructed.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 6/30/16 .

(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Gonzalez et al. v. Vemma Nutrition Company et al.***
Case No. 14CECG00134
Alonzo et al. v. Vemma Nutrition Company et al.
Case No. 14CECG01023
Martinez v. Vemma Nutrition Co. et al.
Case No. 14CECG01715
Smith v. Union Pacific Railroad et al.
Case No. 14CECG02314

Hearing Date: **July 6, 2016 (Dept. 502)**

Motion: Defendants Union Pacific Railroad and R.D. Green's Motion for Determination of Good Faith Settlement

Tentative Ruling:

To grant.

Explanation:

Under Code Civ. Proc. § 877.6, "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005." (Code Civ. Proc. § 877.6(a)(1).)

"The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." (Code Civ. Proc. § 877.6(b).)

"A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (Code Civ. Proc. § 877.6(c).)

The motion is opposed by Vemma Nutrition. "The party asserting the lack of good faith shall have the burden of proof on that issue." (Code Civ. Proc. § 877.6(d).)

Despite the long list of injuries identified in Martinez's discovery responses, the medical records subpoenaed only reflected a total of $125,000 in economic damages. This settlement reflects 80% of the joint and several economic damages. While not typically considered, Martinez's deposition testimony

indicated that she has not been receiving treatment for her injuries, indicating it is unlikely her economic damages will increase by much. While Martinez' claimed $5,000,000 in non-economic damages in her Statement of Damages, the amount of this claim that a jury sees fit to award Martinez will be borne severally, not jointly by any remaining defendants at the time of trial. (See Civ. Code § 1431.2(a).) So the remaining defendants will not be left holding the bag for significant damages due to as determination that the settlement is in good faith.

Repeating arguments made in their summary judgment motions, movants contend that their share of potential liability is likely zero, as the crossing met the minimum requirements for warnings, signage and traffic control devices, and Mr. Green followed applicable regulations with regards to the train's speed, lights and sounding the horn. Vemma disputes that Union Pacific would face no liability, contending that the crossing was not in compliance with PCU's General Order 75-D.

Regardless of whether movants end up prevailing on the issue of liability, the court finds that the settlement was reached in good faith. Vemma has not shown otherwise, or that it is likely to be prejudiced at all by the settlement.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 6/30/16 .

(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***Canady et al. v. Saiz***
Superior Court Case No. 15CECG01136

Hearing Date: July 6, 2016 (Dept. 502)

Motion: Petition to Compromise a Minor's Claim

Tentative Ruling:

To grant as to both minors. Orders signed as to Antiana. Petitioner to submit an order approving the compromise as to Antaejah for signature and an order to deposit. Hearing off calendar.

The Court notes that it is unclear why approximately 10 inches of untabbed medical records were submitted as attachment 9 to the one petition. The mandatory form requires the petition to include all records containing a diagnosis or prognosis. The petition does not require the entirety of the medical records. Providing such a large volume of documents with no tabs makes it virtually impossible for the Court to identify the relevant documents including the required statement of the minor's present condition. In the future the Court request only relevant document be provided. Further, the Court request that the attorney review Local Rule 1.1.10 prior to any new filings.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 6/30/16 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***McDonald v. Beck et al.***, Superior Court Case No. 13CECG03807

Hearing Date: **July 6, 2016 (Dept. 502)**

Motion: Defendant's Motion to Expunge Lis Pendens

Tentative Ruling:

To deny. (Code Civ. Proc. § 405.30.)

Explanation:

A lis pendens may be expunged on the grounds that the lis pendens is improper because the complaint does not contain a "real property claim," or plaintiff cannot establish its "probable validity" by a "preponderance of the evidence." (Code Civ. Proc. §§ 405.31, 405.32.) The plaintiff bears the burden of establishing the existence of a "real property claim" and that it is "probably valid." (Code Civ. Proc. § 405.32.)

Expungement of an improper lis pendens is mandatory, not discretionary. Thus, if the court finds the underlying claim is not a 'real property claim' or that its 'probable validity' has not been established 'by a preponderance of the evidence,' it must order the lis pendens expunged. (Code Civ. Proc. §§ 405.31, 405.32.)

The court finds that the Third Amended Complaint does set forth a real property claim. The first cause of action for declaratory relief does not seek any relief that would affect title to the property at issue. However, seeks specific performance and imposition of a constructive trust. Actions for specific performance and declaratory relief constitute real property claims. (*Hilberg v. Superior Court* (1989) 215 Cal.App.3d 539 and *Mason v. Superior Court* (1985) 163 Cal.App.3d 989, 996.)

While a claim seeking imposition of a constructive trust solely to secure the collection of money damages is not a "real property claim" (*Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 916-919; see also *Urez Corp. v. Superior Court* (1987) 190 Cal.App.3d 1141; *La Paglia v. Superior Court* (1989) 215 Cal.App.3d 1322), in this case plaintiff does not seek only seeking monetary damages. She ultimately seeks to obtain an interest in the real property at issue, which is the purpose of a lis pendens. (Campbell, supra, at p. 917.) So this case is distinguishable from *Campbell*, *Urez* and *La Paglia*.

Inadequacy of the remedy at law is a fundamental condition of equitable relief. (*Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.*

(1976) 65 Cal.App.3d 121, 131.) "[W]here a party seeks title to property, or some other interest dependent upon the uniqueness of a particular parcel of property, the party cannot ordinarily be made whole by money alone. (Civil Code § 3387 ['It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation']".) *Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 918.)

"[E]even where a claim undisputedly affects title to property, a lis pendens must be expunged where the claimant can be made whole by a monetary award." (*Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 917.)

Plaintiff alleges that she has no adequate legal remedy in that the property is not only unique under the law, but is longtime family owned property that has value to plaintiff that cannot be adequately compensated by money damages. (TAC ¶ 49.)

Defendant argues that plaintiff cannot allege that the properties are of unique value to her because she alternatively seeks monetary damages. However, defendant cites to no authority for the proposition that seeking an alternate remedy, in the event that equitable relief is not afforded, precludes equitable relief. A complaint may allege inconsistent theories, including seeking specific performance of an agreement, or in the alternative, damages for the breach thereof. (*Brandolino v. Lindsay* (1969) 269 Cal.App.2d 319, 324.)

Defendant also contends that plaintiff has contradicted this allegation. The parties previously settled at a time when defendant had already contracted to sell the properties to a third party. The settlement agreement required plaintiff to clear any damages from the third-party purchaser and pay the commission fee to the real estate agent, Ron Silva. (Gilmore Dec. ¶¶ 1, 4.) In attempting to negotiate Silva's commission, plaintiff's prior counsel asked Silva to waive his commission in exchange for plaintiff's agreement to hire him to list the properties for another sale. (Silva Dec. ¶ 4.) Defendant says that this shows that plaintiff was merely going to flip the properties for a profit – clear evidence that the property is not unique to her and that monetary damages would suffice.

However, there is no evidence that this was plaintiff's actual intent or wish. We don't know if prior counsel merely brought up his own idea when negotiating with Silva. We don't know if *plaintiff* was actually planning or intending to sell the properties.

The court finds the underlying claim is a "real property claim." Plaintiff must show "probable validity" of her claims "by a preponderance of the evidence." (Code Civ. Proc. §§ 405.31, 405.32.)

The court finds that sufficient evidence has been submitted to show that the oral agreement was in fact made. "The testimony of but one witness, even the party herself, can provide substantial evidence." (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Plaintiff submits ample evidence that Beck agreed to

make a bequest transferring the Mountain View Properties to plaintiff in exchange for plaintiff's agreement to move to Caruthers and assist the Becks with their physical health-related needs and management of their affairs. (See evidence cited at pp. 6-7 of the Supplemental Opposition.) Defendant continued to repeat her promise until she told plaintiff that she intended to change her will in June 2013, well after the death of James. (McDonald Dec. ¶ 14.) Plaintiff detrimentally relied on defendant's promise by moving to Caruthers, caring for the Becks, and expending substantial sums of money on improvements to the residence on the property.

Defendant contends that the oral agreement is an unenforceable contract to make a will and is barred by Probate Code section 21700 and the statute of frauds set forth in Civil Code section 1624.

Defendant quotes from *Di Salvo v. Bank of California, Nat. Ass'n* (1969) 274 Cal.App.2d 351, 354, which states: "Every will, other than a nuncupative will, must be in writing (Prob. Code, § 50) and under the statute of frauds (Civ. Code, § 1624, subd. 6) an agreement to devise or bequeath any property or to make any provisions by will is invalid unless in writing." However, on this point *Di Salvo* is outdated. Former subdivision 6 of Civil Code § 1624 was deleted in the 1983 amendment, and superseded by Probate Code § 150. (See Civ. Code § 1624, Law Revision Commission Comments re 1983 Amendment.) Probate Code § 150 was repealed in 200 by A.B. 1491, which added Probate Code section 21700. Defendant has not shown the applicability of any statute of frauds other than section 21700.

Section 21700 provides that a contract to make a will or devise can be established only by one of the following:

> (1) Provisions of a will or other instrument stating the material provisions of the contract.
> (2) An expressed reference in a will or other instrument to a contract and extrinsic evidence proving the terms of the contract.
> (3) A writing signed by the decedent evidencing the contract.
> (4) **Clear and convincing evidence of an agreement** between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity.
> (5) Clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity.

(Prob. Code § 21700(a), emphasis added.)

As noted above, plaintiff has presented sufficient evidence that the parties entered into the alleged oral contract. Documentary evidence in the form of multiple trusts evidence the intent to make a disposition of the property on Beck's death to plaintiff.

Defendant points out that in *Estate of Stewart* (1968) 69 Cal.2d 296, 303, the court stated that "[a] contract to make a particular disposition of property by will is breached only if it has not been complied with at the time of the promisor's death." However, the court noted that the decedent in that case had not breached the contract because he made a will as promised and did done nothing to impair the appellants' right to the property. (*Id.*)

However, "an exception applies where the promisor **has made** an inter vivos transfer of property specifically covered by the contract," and relief may be sought during the promisor's lifetime. (*Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 846-847, emphasis added.) Plaintiff contends that defendant, the promisor, has made an inter vivos transfer of the property subject to the oral contract transferring the property out of her "Irrevocable Trust" by way of the Affidavit. Defendant's transfer of the property out of her Irrevocable Trust is an action that makes plaintiff's claim actionable at this time.

Accordingly, the court intends to deny the motion.

The court is required to "direct" an award to the prevailing party of the attorney fees and costs of making or opposing the motion unless it finds that either: "the other party acted with substantial justification"; or "other circumstances make the imposition of attorney's fees and costs unjust." (Code Civ. Proc. § 405.38.) Inasmuch as plaintiff does not submit evidence of the amount of attorneys' fees incurred, plaintiff's attorneys' fees will have to be awarded in a future motion.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 6/30/16 .

(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Mendoza v. City of Fresno***
Superior Court Case No.: 13CECG01148

Hearing Date: July 6, 2016 (**Dept. 502**)

Motion: By Defendant City of Fresno to dismiss for Plaintiff's failure to prosecute

Tentative Ruling:

To grant without requiring a hearing on the merits, with Defendant directed to submit directly to this Court, within 7 days of service of the minute order, a proposed judgment dismissing the action.

Explanation:

Considering the factors in California Rules of Court, rule 3.1432(e), and Code of Civil Procedure section 583.310, as well as the matters sought to be judicially noticed, the Court notes that the relief in this action has been largely obtained in a misdemeanor action pending against Plaintiff Martel Mendoza, M14913270, and that the case has lain mostly dormant since its filing on April 12, 2013. Additionally, the Court notes that Plaintiff Martel Mendoza, individually and dba Mr. M's, has not opposed this motion, and construes that failure as an admission that the motion is meritorious, and grants the motion without a hearing on the merits. (Cal. Rules of Court, rule 3.1342(b).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 6/30/16 .
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Rattan v. Singh***
Case No. 14 CE CG 02408

Hearing Date: July 6th, 2016 (Dept. 502)

Motion: Plaintiff's Application for Default Judgment

Tentative Ruling:

To deny plaintiff's application for default judgment, without prejudice.

Explanation:

Plaintiff seeks money damages of over $740,000 against the defendants for their actions in preventing plaintiff from collecting on his judgment. Plaintiff also seeks damages for defendants' failure to pay the previously ordered money sanctions for their refusal to respond to discovery. In addition, plaintiff requests punitive damages that are equal to the other damages as punishment of defendants for their fraudulent and malicious conduct.

However, plaintiff is not entitled to additional money damages against defendants Harjot Singh and Inderjit Singh under the Uniform Fraudulent Transfer Act (UFTA), especially since the damages plaintiff seeks are equivalent to the prior judgment he has already received in the underlying breach of contract case. Plaintiff is essentially seeking a double recovery based on defendants' efforts to defeat his right to collect on his judgment, but such damages are improper in an UFTA action.

"The UFTA is remedial legislation designed to protect creditors by authorizing them to set aside transfers of property by which debtors try to avoid paying debts by putting assets beyond creditors' reach. When a debtor transfers property '[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor', the creditor may obtain '[a]voidance of the transfer ... to the extent necessary to satisfy the creditor's claim.' To the extent the transfer is voidable, the creditor 'may recover judgment for the value of the asset transferred ... or the amount necessary to satisfy the creditor's claim, whichever is less,' and the judgment may be entered against '[t]he first transferee of the asset or the person for whose benefit the transfer was made.'" (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1235, internal citations omitted.)

While the court may enter a judgment setting aside the fraudulent transfer, and it may also enter a money judgment against the first transferee, the court may not enter a money judgment against the judgment debtor where the

money judgment would duplicate the judgment that the creditor has already obtained against the debtor. (*Renda, supra*, at 1236-1237.)

"A well-established principle, applied both at law and in equity, is that a plaintiff is entitled to only a single recovery for a distinct harm suffered, and double or duplicative recovery for the same harm is prohibited... The UFTA does not impose on the debtor any liability additional to or distinct from the existing claim of the creditor; it simply allows the creditor to obtain '[a]voidance of the transfer ...*to the extent necessary to satisfy the creditor's claim*.' A 'defrauded creditor is not entitled to an enhancement of position beyond what it was before the fraud.' … We thus conclude that because [the judgment creditor] obtained a judgment in the prior action for the damages [the judgment debtor] caused him, the principle against double recovery for the same harm bars him from obtaining a second judgment against her under the UFTA for a portion of those same damages." (*Id*. at 1237-1238, internal citations omitted, italics in original.)

Likewise, here plaintiff has already obtained a judgment of $700,000 against defendants Harjot Singh and Inderjit Sandhu, so he cannot obtain another judgment for the same amount against them here based on their fraudulent conveyances and attempts to prevent him from collecting on his judgment. To do so would be to allow plaintiff a double recovery on his judgment. At most, he is entitled to an order setting aside the transfers as fraudulent, as well as injunctive relief, an attachment order, or a receivership regarding the transferred assets. (Civil Code § 3439.07.) He may also be able to obtain a money judgment against the transferees up to the amount of the transferred assets or the amount of the underlying judgment, whichever is less. (Civil Code § 3439.08.)

Also, plaintiff cannot obtain a money judgment against First Continental Mortgage for its participation in the fraudulent transfer, since there is no evidence that it actually received any transferred assets. It merely participated in the fraudulent encumbrance of the defendants' real property without actually receiving the property itself. Therefore, the court intends to deny the application for a money judgment against First Continental, as well as the application for a money judgment against Harjot and Inderjit. However, plaintiff may be entitled to a judgment against Baljit, as he was a first transferee of the Subway restaurants.

In addition, plaintiff has not shown that he is entitled to punitive damages against the defendants here. As discussed above, any additional money judgment against Harjot and Inderjit would be a double recovery against them, since plaintiff already has a judgment in his favor as to these defendants. There is also nothing in the UFTA that authorizes an award of punitive damages against parties who make or participate in fraudulent transfers. Furthermore, even assuming there were some authority for awarding punitive damages under these circumstances, plaintiff has not provided any evidence of the defendants' economic value or provided any factual basis for the amount of damages requested, and the requested amount merely duplicates the previous judgment.

Therefore, plaintiff has failed to show that he is entitled to punitive damages here.

Next, while plaintiff requests a money judgment against defendants based on the money sanctions awarded against them for their failure to respond to the discovery requests, the court has already awarded sanctions against defendants as part of the motions to compel. Granting further money sanctions would be duplicative. Plaintiff can enforce the prior order for sanctions as a separate judgment, so there is no need to make another judgment for the same amount.

Also, while plaintiff seeks money damages as part of its conspiracy cause of action, a conspiracy claim is not a separate cause of action, so plaintiff cannot obtain separate money damages under the conspiracy claim. "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration… [¶] Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 510–511.) "A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve." (*Id*. at p. 513.)

Here, the only "underlying tort" alleged is the fraudulent transfer of property to avoid paying the judgment. However, as discussed above, plaintiff has no right to collect money damages against most of the defendants under the UFTA, so the civil conspiracy claim cannot be used to impose money damages that are not otherwise available for violation of the UFTA. Plaintiff's proposed default judgment here thus seeks excessive money damages against parties that are not subject to such damages under the UFTA.

As a result, the court intends to deny the request to enter the default judgment in its current form. The plaintiff must redraft the judgment to delete most of the requested money damages, except perhaps against defendant Baljit Singh, and limit the remainder of the requested relief to orders setting aside the fraudulent transfers.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 7/5/16 .

(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Aujaneek Moore v. Antonio Solorio***

Superior Court No. 15CECG03017

Hearing Date: Wednesday, July 6, 2016 (**Dept. 502**)

Motion: (1) Defendant County of Fresno's Demurrer to First Amended Complaint

Tentative Ruling:

To order off calendar.

Explanation:

No first amended complaint appears in the court's file.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 6/30/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503